As explained in Parts II.C, and D of this Evaluation, BellSouth has failed to show that competitors can be assured of appropriate access to essential inputs, i.e., that they will receive unbundled elements from BellSouth in a manner that allows them to combine those elements, and that they will have the legally-required access to OSSs that will permit them to compete effectively through the use of resale or unbundled elements. In addition to those deficiencies, BellSouth has failed to show that unbundled elements are currently offered, or will be offered in the future, at prices that will permit entry and effective competition by efficient firms, and has failed to show that it will provide objective measures of its wholesale performance that will ensure that competitors receive nondiscriminatory access to inputs now and in the future.

1. BellSouth Has Not Demonstrated That Current or Future Prices for Unbundled Elements Will Permit Efficient Entry or Effective Competition

Competition through the use of unbundled network elements will be seriously constrained, and may even be impossible, if those elements are not available at appropriate prices. In evaluating pricing arrangements as part of its competitive assessment, the Department will ask whether a BOC has demonstrated that its current prices are, and future prices will be, supported by a reasoned application of an appropriate methodology.

Reasoned Application Of An Appropriate Methodology. In order to conform to the Act, rates for interconnection and access to unbundled elements must be "just, reasonable, and nondiscriminatory," 47 U.S.C. §251(c)(2)(D), see also 47 U.S.C. §252(d)(1), (1)(A)(ii), and "based on the cost (determined without reference to a rate-of-return or other rate-based

proceeding) of providing the interconnection or network element (whichever is applicable)," 47 U.S.C. §252(d)(1)(A)(i); such rates "may include a reasonable profit." 47 U.S.C. §252(d)(1)(B). There have been no judicial decisions concerning the types of rate-making methodologies that are consistent, or inconsistent, with these statutory requirements. In our view, however, there are a variety of forward-looking cost methodologies that are consistent with the statutory requirements, and with the Department's standard for evaluating whether markets are fully and irreversibly open to competition.

Such methodologies, if properly applied, will create incentives for efficient investment by incumbents and potential entrants; will permit effective competition by new entrants on an equal footing, in which the relative efficiency of entrants and incumbents is suitably rewarded by the marketplace; and will stimulate price competition and service improvement for consumers. As well established economic principles make clear, forward-looking costs govern prices and entry decisions in competitive markets, and thus, those principles best promote competition in a market moving from a regulated monopoly to a competitive market.[44]

A variety of forward-looking methodologies also are likely to lead to prices that are "nondiscriminatory." As we have previously explained, the real cost of a network element to a

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[44] See, e.g., Stigler, G., The Theory of Price III (4th ed. 1987); Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, CC Docket No. 96-98 and 95-185, FCC 96-325, ¶ 705 & n.1716 (rel. Aug. 8, 1996) ("Local Competition Order"). See also Duquesne Light Co. v. Barasch, 488 U.S. 299, 308 (1989) (ratemaking on the basis of forward-looking costs "mimics the operation of the competitive market"); MCI Communications Corp. v. American Tel. & Tel. Co., 708 F.2d 1081, 1116-17 (7th Cir.), cert. denied, 464 U.S. 891 (1983) ("it is current and anticipated cost, rather than historical cost, that is relevant to business decisions to enter markets and price products").

BOC will be its own forward looking economic cost; charging a higher price to its competitor therefore may be discriminatory and anticompetitive.[45] Prices based on forward-looking economic costs will allow a BOC to obtain the "reasonable profit" allowable under the Act; monopoly profits a BOC might seek at its competitors' expense, thereby depriving customers of the benefits of cost-based prices, would be excluded.

Recognizing that the use of forward-looking cost methodologies is consistent with the 1996 Act and will further its procompetitive purposes and benefit consumers, a significant number of state PUCs have chosen to adopt such methods, see e.g., Local Competition Order ¶ 681, n.1687,[46] as has the Commission,[47] and other federal administrative agencies in related contexts.[48] Of course, the label attached to a particular methodology is not determinative; it is the substance

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[45] Comments of the United States Department of Justice, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, at 28-30 (filed May 16,1996) ("DOJ Local Competition Comments").

[46] According to a recent NARUC report, Telecommunications Competition 1997, Table 4 (Sept. 1997), 32 of 51 reporting commissions have said that they employ some form of forward-looking cost based pricing, including TELRIC or TSLRIC, while 18, including South Carolina, have not adopted such a pricing methodology. The Department does not express an opinion on whether states' characterizations of their pricing methodologies as based on forward looking costs in this report are accurate.

[47] Michigan Order ¶¶ 289-294.

[48] In recent years, for example, the Interstate Commerce Commission and its successor, the Surface Transportation Board, have regulated railroad rates on the basis of forward-looking costs. See, e.g., West Tex. Util. Co. v. Burlington N.R.R., No. 41191, 1996 WL 223724 (I.C.C.) (S.T.B. May 3, 1996), aff'd 114 F.3d 206 (D.C. Cir. 1997); Bituminous Coal -- Hiawatha, Utah, to Moapa, Nevada, 10 I.C.C. 2d 259 (1994); Omaha Pub. Power Dist. v. Burlington N.R.R., 3 I.C.C. 2d 123 (1986).

that counts.

If the prices for unbundled network elements in a state are derived through a methodology other than a forward-looking economic cost methodology, we could not conclude that market is fully open to competition unless, after careful consideration of the reasoning behind the prices on a case-by-case basis, we were able to determine that the alternative standard on which prices are based is consistent with the 1996 Act and permits entry and effective competition by efficient firms.[49]

Some ratemaking methods that were designed to operate in and to preserve a regulated monopoly environment would seem to be fundamentally inconsistent with that standard. For example, use of the "Efficient Component Pricing Rule" to establish prices for unbundled network elements would insulate a BOC's retail prices from competition, thereby discouraging entry in markets where current retail prices exceed competitive levels.[50] Such effects would impede the transition from regulated monopoly telecommunications markets to de-regulated, competitive

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[49] The 1996 Act also requires that all retail services be made available for resale at a wholesale discount (47 U.S.C. §251(c)(4)), and requires states to set the wholesale discount based on an "avoided" cost methodology (47 U.S.C. §252(c)(3)). It follows that a state must also explain how it has set the resale discount consistent with the 1996 Act, including articulating the methodology it has used and how it has applied the methodology. Issues have been raised by several commenters about whether BellSouth's 14.8% resale discount is consistent with the 1996 Act. While the Department does not analyze that issue in this evaluation, as there are several other grounds for denial of the application, this pricing issue would have to be considered before any approval of entry in South Carolina would be possible.

[50] See, e.g., In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Reply Comments of the United States Department of Justice, CC Docket No. 96-98, at 11-13 (filed May 30, 1996) ("DOJ Local Competition Reply Comments")

markets, and would deprive consumers of the benefits of price competition and new investments in telecommunications services.

Similarly, in the pre-Act regulated monopoly environment, universal service objectives were often promoted by insulating incumbent LECs from competition so that they could charge prices substantially above cost for some services, and use the resulting revenues to provide other services at or below cost. At least in some cases, if unbundled network elements are priced above cost, competitors could be discouraged from entering, or if they did enter, could be forced to bear a disproportionate share of the cost of supporting universal service objectives. In any event, their ability to compete on the merits would thereby be impaired.[51]

Whatever methodology is used, a reasoned application to the particular facts is needed. We expect that in most cases, a BOC will be able to demonstrate this by relying on a reasoned pricing decision by a state commission. However, if a state commission has not explained its critical decisions, or has explained them in terms that are inconsistent with procompetitive pricing principles, the Department will require further evidence that prices are consistent with its open-market standard.

Future Prices. Expectations concerning future prices can be as important, or even more important, than current prices. A market will not be "irreversibly" open to competition if there is a substantial risk that the input prices on which competitors depend will be increased to

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[51] All providers of telecommunication services, including but not limited to those that use unbundled elements, "should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service." 47 U.S.C. § 254(b)(4).

inappropriate levels after a section 271 application has been granted. Such a price increase obviously could impair competitive opportunities in the future. As important, a substantial *risk* of such a price increase can impair competition *now*. Competitors that wish to use unbundled elements in combination with their own facilities will incur significant sunk costs when they invest in their own facilities. Such investment will not be forthcoming *now* if there is a substantial risk that increases in the prices for complementary assets, i.e., unbundled elements, will raise a competitor's total costs to a degree that precludes effective competition.

This does not mean that the prices must be permanently unchangeable. Such rigidity would be undesirable, both because costs change over time, and because adjustments to rate-making methodologies may be appropriate as market conditions change. However, competitors must have sufficient confidence about future prices to justify prudent investments in entry.[52] The basis for such confidence may be provided either by a BOC or by a state commission, through a variety of mechanisms such as long-term contractual arrangements, commitments to appropriate methodologies, and the like. Without some basis for confidence that future prices will be appropriate, we will not consider a market to be fully and irreversibly open to competition.

Pricing of Unbundled Elements in South Carolina. In South Carolina, BellSouth has not demonstrated that current prices permit entry and effective competition by efficient firms, and there is great uncertainty concerning the prices that will be available in the future. Given this

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[52] As Professor Schwartz explained in his affidavit, "[p]rohibitively high prices would render the new access arrangements [i.e., to unbundled network elements] meaningless; to permit efficient local entry, entrants must have adequate assurance that BOC prices for these inputs will remain reasonable and cost-based after interLATA relief is granted." Schwartz Aff. ¶ 22.

uncertainty, it is not surprising that there is no real competition using unbundled elements now, or that competitors' plans to compete in the future are subject to many contingencies.

BellSouth has not attempted to establish independently, in this proceeding, that it offers appropriate prices for unbundled elements. Instead, it relies solely on the determinations of the SCPSC, which it erroneously characterizes as "definitive" or "conclusive" for purposes of its application.[53] However, based on the record in this proceeding, we do not believe the conclusions of the SCPSC, standing alone, support a finding that the market in South Carolina is fully and irreversibly open to competition.

The SCPSC has not articulated a forward-looking cost methodology. Indeed, it has stated that it "has not adopted a particular cost methodology." SCPSC Order at 56. Instead, the prices contained in the SGAT were incorporated from several sources, including the BellSouth/AT&T arbitration, existing tariff rates, and rates negotiated in interconnection agreements with other carriers. Id. at 53. There is no explanation of the costs on which they are based.[54]

With respect to the rates derived from the BellSouth/AT&T arbitration, the SCPSC states

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[53] BellSouth Brief, at 37, 40.

[54] For example, the current wholesale rate structure in South Carolina for unbundled network elements does not include any variation in prices according to the actual costs in unbundled network elements across the state or any explanation as to when such geographically deaveraged prices would become available. In states with significantly varying loop densities, for example, we would expect there to be different unbundled loop prices made available to competitors. We recognize that the process of de-averaging may need to be accomplished over some transition period, but encouraging efficient entry requires that cost-based wholesale rates are the objective of a wholesale pricing structure. The SCPSC has not attempted to explain its departure from this approach here.

only that the rates were "within the bounds" of the cost studies provided by the parties in that arbitration, and that "many" of the rates were within the Commission's proxy rate ranges. Id. at 55. As to prices derived from negotiated interconnection agreements, the SCPSC states only that such rates "were certainly not set by the parties without reference to the cost of the services to be provided." Id. And the SCPSC offers no explanation for its conclusion that rates derived from preexisting tariffs conform to the cost-based pricing requirements of the 1996 Act.

These explanations are surely insufficient to demonstrate that BellSouth's unbundled element prices will permit efficient competition. While there is no single cost methodology that is required, surely some consistently applied methodology is needed.[55] In weighing conflicting cost studies presenting by opposing parties, there must be some reasoned explanation for a decision to accord greater weight to one rather than the other.

The fact that a rate has been negotiated in an interconnection agreement provides no basis for concluding that such a rate is competitively appropriate on a permanent basis for all parties. As the Commission has recognized, incumbent LECs may be able to exercise substantial market power in such negotiations.[56] Potential entrants may accept rates substantially in excess of cost, particularly if by doing so they can avoid the substantial cost and delay of arbitration proceedings,

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[55] See DOJ Oklahoma Evaluation, at 61 ("The [Oklahoma Corporation Commission] arbitrator's decision on the AT&T application did not recommend 'any particular methodology or cost study be adopted at this time.'").

[56] Local Competition Order ¶ 55. See also Schwartz Aff. ¶ 188 ("There is great asymmetry in these bargaining powers--since the dominant incumbent is content to preserve the status quo, while the entrant is clamoring for an agreement.").

or secure more favorable terms with respect to other provisions of their agreement.

The problems with current unbundled element prices are compounded by the great uncertainty concerning future prices. The SCPSC has expressly refused to articulate the methodology, if any, that it will use to establish "permanent" rates, and thus there is no assurance that the "permanent" rates will permit efficient competition using unbundled elements. The "true up" and "price cap" mechanisms in place in South Carolina do not solve these problems. To the extent BellSouth relies on the subsequent "true-up" of current prices to conform to final prices, as a safeguard against excessive current prices, this would not apply to many of the prices in the SGAT, such as those derived from pre-existing tariffs, that are not subject to "true-up". Moreover, where no methodology for permanent pricing has been established a "true-up" only leads to additional uncertainty as to what prices competitors ultimately will have to pay for elements ordered in the interim. The SCPSC's "price cap" on those prices subject to true-up does not adequately address this uncertainty as it only limits, at most, increases on elements already ordered, not prospective price increases on elements generally, which could end up being priced substantially higher than the interim rates. Thus, these mechanisms do not preclude the possibility that in the near future, unbundled element prices may increase significantly, in ways that are both unpredictable and anticompetitive.[57]

In short, the record in this application does not establish that either current or future prices

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[57] See DOJ Oklahoma Evaluation at 62 ("Since it is not yet known what the final Oklahoma prices will be or how they will be determined, the provision for a true-up is hardly sufficient assurance that competitors will in fact be charged cost-based prices now or later.").

for unbundled elements will permit efficient firms to enter and compete effectively. Because of this deficiency, we cannot conclude that the market is fully and irreversibly open to competition using unbundled elements.

The Commission Has Authority To Take Account of Pricing. Although BellSouth apparently concedes that a state commission's conclusions do not bind the Commission as to Track A/ Track B issues, nonprice elements of the checklist, or the public interest test, it argues that "[t]he SCPSC's pricing determinations are conclusive" for section 271 purposes and that the Commission lacks authority to take account of a state's wholesale pricing structure.[58] From the Department's standpoint, this argument is plainly wrong, as the 1996 Act mandates that the Department undertake a competitive assessment using "any standard the Attorney General considers appropriate"[59] and that the Commission must give "substantial weight" to this Evaluation.[60] In our view, an assessment about whether the local market has been "fully and irreversible opened to competition"--the inquiry we deem appropriate under this statutory mandate--necessarily requires some assurance that the prices in place--and which will continue to be available--reflect procompetitive pricing principles. The Commission is free to give effect to our Evaluation about the pricing structure however it chooses; but in order to follow the statutory directive of giving substantial weight to our Evaluation, the Commission must retain--by

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58 BellSouth Brief, at 37.

59 47 U.S.C. §271(d)(2)(A).

60 Id.

necessary implication--the authority to do so in exercising its authority under section 271.

2. Bell South Has Failed to Institute Performance Measurements Needed to Ensure Consistent Wholesale Performance

A conclusion that a market has been "fully and irreversibly opened to competition" requires both a demonstration that the competitive conditions currently in place will foster efficient competition, as well as assurances that those conditions will remain in place after a section 271 application has been granted. In terms of wholesale performance -- where a BOC's systems will be critical to enabling its competitors to succeed in the marketplace -- an appropriate means of "benchmarking" performance is needed. As we have explained previously, we examine whether a BOC has established (1) performance measures and reporting requirements so that wholesale performance can be measured; (2) performance standards -- i.e., commitments made by the BOC as to its anticipated levels of performance; and (3) performance benchmarks -- i.e., a track record of performance. These steps will permit an assessment of current performance and will enable competitors and regulators to more effectively address any post-entry "backsliding" from prior performance through contractual, regulatory, or antitrust remedies.

BellSouth has made several important commitments to gather and maintain performance data. First, BellSouth has implemented a data warehouse, separate from the mainframe computers on which its OSSs run, in which raw data relating to performance can be stored and through which it can be queried and analyzed.[61] Second, BellSouth states that it is capturing for

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[61] Affidavit of William N. Stacy, Checklist Compliance (Performance Measures) ¶ 13 ("Stacy Performance Aff."), attached to BellSouth Brief as Appendix A-Volume 5, Tab 13.

subsequent analysis "[e]very order processed by BellSouth for both its retail units and its CLEC customers." Id. ¶ 14. Third, BellSouth states that it plans to allow CLECs to directly access the data warehouse to perform their own analyses. Id. ¶ 15. BellSouth is to be commended for committing itself to such a system for gathering, storing, and providing access to performance data. BellSouth's approach is clearly a desirable way to proceed, and we strongly support these commitments.

Notwithstanding this desirable architecture, as discussed in Appendix A and the Friduss SC Aff., BellSouth has failed to "provide[] sufficient performance measures to make a determination of parity or adequacy in the provision of resale or UNE products and services to CLECs." Friduss SC Aff. ¶ 78.[62] Most significantly, BellSouth is not providing actual installation intervals, instead relying on the "percentage of due dates missed." Yet the type of measurement upon which BellSouth relies is not sufficient to demonstrate parity: if BellSouth were to miss 10% of scheduled due dates for both BellSouth retail operations and CLEC customers but missed the scheduled date by an average of one day for its own customers and an average of seven days for CLEC customers, BellSouth's measurement would be equal and yet would conceal a significant lack of parity. As the Department and the Commission have previously concluded, "[p]roviding resale services in substantially the same time as analogous retail services is probably

[62] If a BOC can establish that an effective substitute can serve the same purpose as the measures outlined here, the Department, of course, would be willing to consider the use of a substitute measure.

the most fundamental parity requirement in Section 251."[63]

In addition, BellSouth has no performance measurements for pre-ordering functions; few measurements for ordering functions; and no measurements for billing timeliness, accuracy and completeness. BellSouth is also missing numerous significant measurements involving service order quality, operator services, directory assistance, and 911 functions. Also, while BellSouth has committed to measuring firm order confirmation cycle time and reject cycle time, the development of these measurements is incomplete and thus results are not yet available. Collectively, these deficiencies prevent any conclusion that adequate, nondiscriminatory performance by BellSouth can be assured now or in the future.

Given BellSouth's lack of performance measures in a number of crucial areas, we also are unable to determine whether BellSouth has established performance standards that are enforceable as to these areas, as well as a track record, or benchmark, of wholesale performance. As is true with our analysis of OSS generally, our insistence on performance benchmarks does not require any particular level of use in South Carolina. Appropriate benchmarks may be established through commercial performance elsewhere in the BellSouth region. In the event that a BOC is not able to set a benchmark through actual use -- though we doubt that any region will not have some actual competitive entry -- the Department would consider other means of ensuring adequate performance, including enforceable performance standards and other means of demonstrating wholesale capability -- i.e., carrier-to-carrier testing, independent auditing, or internal testing. In

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[63] Appendix A to DOJ Michigan Evaluation at A-12, quoted with approval in Michigan Order ¶ 167.

this case, however, BellSouth has not yet instituted the necessary performance measures, adopted enforceable performance standards, or demonstrated a satisfactory performance benchmark (through actual use or otherwise). Thus, given our inability to conclude that the necessary protections against backsliding are in place, we cannot conclude that the market has been fully and irreversibly opened to competition.

C. BellSouth's "Public Interest" Arguments Do Not Justify Approval of This Application

BellSouth erroneously contends that the benefits of allowing its entry now into the interLATA market in South Carolina warrant approval of this application under the "public interest" standard. BellSouth and its economic experts significantly overvalue the benefits of the BOC's long distance entry now, and undervalue the benefits to be gained from opening BellSouth's local markets, as explained in the Supplemental Affidavit of Marius Schwartz.

We agree that there could be competitive benefits from BOC entry into long distance markets, but the estimates of the size of those benefits provided by BellSouth and some of its economic experts, as well as experts retained by the BOCs in previous section 271 entry applications, appear on closer analysis to rest on unconvincing analytical and empirical assumptions. Schwartz Supp. Aff. ¶¶ 60-84. The economic incentives of the BOCs to cut prices substantially on entering interLATA markets are considerably weaker than the BOCs' experts claim. Id. ¶¶ 63-76. Long-distance markets already are significantly more competitive than local markets. Particularly, higher-volume residential and business customers benefit from considerable rivalry. Id. ¶¶ 18, 79, 84. The BOC experts that have estimated large price reductions from BOC

interLATA entry, based on experiences with SNET and GTE, have exaggerated the benefits realized by consumers from interLATA competition by those ILECs, by failing to take into account the best available rates from the interexchange carriers already in the market and focusing primarily on undiscounted AT&T rates, and the less favorable of the rate plans AT&T offers. Id. ¶¶ 80-83. This does not mean that consumers have realized no benefits from entry by ILECs such as SNET, but the BOCs' experts have not provided an analysis that would adequately support the large benefits they project from BOC entry.

Still more important, BellSouth and its economic experts, as well as experts retained by BOCs in previous entry applications, have failed to give adequate consideration to the more substantial benefits to be gained from requiring that the BOC's local markets be opened before allowing interLATA entry. Their analyses have simply assumed that the requirements of section 271 would be satisfied, or addressed the benefits of local competition in a cursory manner that undervalues their importance. The Department's analysis and that of Dr. Schwartz, in contrast, give full consideration to competitive effects in both the interLATA and the local markets. Because the local markets are both much larger than interLATA markets and still largely monopolistic, the benefits from opening the BOCs' local markets to competition prior to allowing BOC interLATA entry are likely to substantially exceed the benefits to be gained from more rapid BOC participation in long distance markets. Id. ¶¶ 14-25. Ensuring BOC cooperation requires conditioning BOC long distance market entry on the Department's standard of local markets being fully and irreversibly open. Experiences with regulating other complex new access

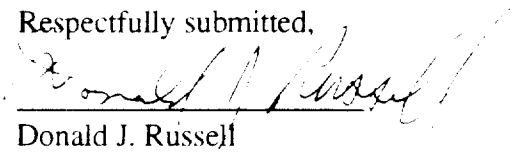
arrangements (e.g., interLATA toll, intraLATA toll, and open network architecture) indicates that opening local markets would take much longer without this cooperation. And thus the Department's entry standard, far from delaying competition, promotes it, more than would dependence on post-interLATA entry enforcement to compel the BOCs to open their local markets. Id. ¶¶ 35-59.

Finally, the Department's analysis recognizes, as the analyses by the BOCs' experts do not, that authorization of BOC interLATA entry will not promote local entry if substantial barriers to local entry remain in place. BellSouth and its experts focus only on the incentives of interexchange carriers and other providers to enter the local markets. The Department does not endorse that aspect of BellSouth's analysis, which fails to take into account important differences between various types of entrants. Id. ¶ 29. But, more significantly, BellSouth and the BOCs' experts fail to appreciate that regardless of the incentives a provider may have to enter local markets, if it does not have an adequate opportunity to enter, then entry will not occur. Id. ¶¶ 30-34. Under the 1996 Act, for that opportunity to exist, the BOC must be presently willing and able to provide at cost-based rates what competitors require for entry at various scales of operation, using interconnected separate facilities, unbundled elements and resale. BellSouth has not shown that this opportunity now exists in South Carolina, and so its interLATA entry would not be in the public interest.

IV. Conclusion

BellSouth has not satisfied the requirements of the competitive checklist, and has not taken all measures needed to ensure that local markets in South Carolina are fully and irreversibly open to competition. For these reasons, BellSouth's application for in-region interLATA entry in South Carolina under section 271 of the Telecommunications Act should be denied.

Respectfully submitted,



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November 4, 1997

EXHIBIT 6

Comments of BellSouth on the Eighth Circuit Opinion Docket No. U-20883

BEFORE THE

LOUISIANA PUBLIC SERVICE COMMISSION

In re: **The Development of Rules and Regulations Applicable to the Entry and Operations of, and the Providing of Services by, Competitive and Alternative Access Providers in the Local, Intrastate and/or Interexchange Telecommunications Market in Louisiana**	* * * * * * *	Docket No. U-20883

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COMMENTS OF BELLSOUTH TELECOMMUNICATIONS, INC. ON EIGHTH CIRCUIT OPINION IN *IOWA UTILITIES BOARD*

On September 16, 1997, the Louisiana Public Service Commission (the "Commission") issued a Notice of Proposed Rulemaking seeking comments from interested parties concerning any proposed amendments to the Commission's Regulations for Competition in the Local Telecommunications Market ("Louisiana Regulations") that may be necessary as the result of the July 18, 1997 Eighth Circuit Court of Appeals decision in *Iowa Utilities Board v. FCC*, 120 F.3d 753 (8th Cir. 1997). Similarly, in Order No. U-22252-A dated September 5, 1997, the Commission ordered interested parties to file comments addressing the impact of the Eighth Circuit's decision on the Statement of Generally Available Terms and Conditions ("SGAT") approved by the Commission, subject to certain modifications. BellSouth and other parties submitted comments in response to Order No. U-22252-A on September 15, 19997. In addition to the comments submitted in that docket, BellSouth submits the following updated comments.

1) Vertical features.

One of the issues in the AT&T arbitration (Docket No. 22145) was the price AT&T must pay for BellSouth's vertical services, such as Caller I.D. and Call Waiting. In Orders No. 22145 (dated January 26, 1997) and 22145-A (dated June 12, 1997), this Commission concluded that the price of unbundled local switching did not include the features, functions and capabilities used to provide vertical services, such as Caller ID, Call Waiting, and Call Return, when those features, functions and capabilities are used by AT&T to offer services identical to BellSouth's retail services. In such circumstances, the Commission ruled that these features are retail services that are available to AT&T at the wholesale resale discount. Section 1001.A of the Louisiana Regulations was amended to incorporate this legal and policy decision in March of 1997. BellSouth's original SGAT, filed in May of 1997, also reflected this Commission ruling by stating in the Price List at Attachment A that vertical features were available at the wholesale resale discount for vertical services. Because such features were considered retail services available for resale, rather than unbundled network elements, BellSouth's Price List did not include a specific unbundled rates for vertical features.

Petitioners before the Eighth Circuit argued that the FCC rules that required ILECs to provide competitors with unbundled access to vertical features unduly expanded the ILEC's unbundling obligation beyond the statutory requirement. The Eighth Circuit held that vertical switching features "qualify as network elements that are subject to the unbundling requirements of the Act." 120 F.3d at 808.

In Order No. U-22252-A, dated September 5, 1997, the Commission approved BellSouth's SGAT, subject to modification "to delete the language in the BellSouth Price List in

Attachment A to the Statement that the price of unbundled local switching does not include retail services, and that retail services are available at wholesale rates and substitute the following language: 'Vertical switching features such as call I.D., call forwarding and call waiting are network elements that are subject to unbundling requirements of the Act.'" BellSouth's revised SGAT filed on September 9, 1997 incorporates this modification, which is consistent with the Eighth Circuit ruling.

Recently, on October 23, 1997, the Commission issued Order No. 22022/22093-A, which established permanent, cost-based rates for interconnection and unbundled network elements, including all vertical features offered by BellSouth.

Proposed Action: In order to bring the Louisiana Regulations into line with the Eighth Circuit opinion and this Commission's Order No. U-22252-A, this Commission should amend the Louisiana Regulations as follows:

[Revise Section 901.C.1 as follows:]

1. Physical interconnect charges between and among TSPs shall be tariffed and based on cost information. ILECS shall provide interconnection and unbundled network elements at the permanent, cost-based rates established by the Commission in Order No. 22022/22093-A dated October 23, 1997. ~~The cost information derived from both TSLRIc and LRIC studies shall be provided to the Commission. This information will be used by the Commission to determine a reasonable tariffed rate. There is no mandate that interconnection services be provided by the ILEC to TSPs at its TSLRIC or LRIC of providing such services. As an interim measure, until such cost studies are completed and a decision rendered thereon by the Commission in Docket No. 22022, consolidated with Docket No. U-22093, or other pertinent Commission proceeding, interim rates for unbundled network elements are hereby established as listed on attached Appendix "D." At such time as a final order issues in Docket No. U-22022, consolidated with U-22093, rates will be re-calibrated accordingly.~~

[Delete Section 1001.A except for first sentence and replace with language appearing in next section of Comments]

2) **Recombinations of UNEs.**

A major issue in the AT&T arbitration was the appropriate pricing for recombinations of unbundled network elements used by CLECs to provide finished telecommunications services identical to the ILEC's retail services. BellSouth did not argue in the arbitration that CLECs could not combine network elements in any manner they wanted, including to provide finished telecommunications services; rather, BellSouth contended that, when CLECs recombined ILEC UNEs to create a service identical to the ILEC's retail service, then the CLEC should be required to pay the wholesale retail price for the service and not the combined UNE price of the elements. In Order No. 22145, dated January 26, 1997, the Commission ruled that "AT&T may combine unbundled elements in any manner they choose; however, when AT&T recombines unbundled network elements to create services identical to BellSouth's retail offerings, the prices charged to AT&T for the rebundled services shall be computed at BellSouth's retail price less the wholesale discount ... and offered under the same terms and conditions as BellSouth offers the service under." *See* Order No. 22145 at pp. 39-40. This policy and legal conclusion was incorporated into Section 1001.A of the Louisiana Regulations in the amendments adopted on March 19, 1997, and also was included in BellSouth's original SGAT filed in May of 1997.

Before the Eighth Circuit, petitioners opposed the FCC rules on unbundling, arguing among other things, that CLECs should not be allowed to rely entirely on recombined network elements to provide finished telephone service, but rather should be required to provide some facilities of their own to provide such service. The FCC (and the IXCs) argued that the FCC rules should stand in their entirety, including the rules requiring ILECs to combine network elements on behalf of CLECs.

The Eighth Circuit first rejected unequivocally the FCC rules that required ILECs to recombine network elements purchased by requesting carriers. *Iowa Utilities Board v. FCC*, 120 F.3d at 813. The Court reasoned as follows:

> We also believe that the FCC's rule requiring incumbent LECs, rather than the requesting carriers, to recombine network elements that are purchased by the requesting carriers on an unbundled basis, cannot be squared with the terms of subsection 251(c)(3). The last sentence of subsection 251(c)(3) reads, "An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service." This sentence unambiguously indicates that requesting carriers will combine the unbundled elements themselves. While the Act requires incumbent LECs to provide elements in a manner that enables the competing carriers to combine them, unlike the Commission, we do not believe that this language can be read to levy a duty on the incumbent LECs to do the actual combining of elements.
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> . . . .
>
> Despite the Commission's arguments, the plain meaning of the Act indicates that the requesting carriers will combine the unbundled elements themselves; the Act does not require the incumbent LECs to do all of the work.

Id.

In the next section of its July 29th opinion, the Court rejected petitioners' argument that CLECs should not be permitted to provide finished telecommunications services solely through reliance on unbundled network elements purchased from the ILEC. *Id.* at 813-14. Petitioners had argued that permitting CLECs to provide finished telecommunications services without investing in any facilities of their own would defeat the purpose of the Act and subvert the resale provisions of the Act. In rejecting these arguments, the Court carefully distinguished the provision of service using unbundled network elements from the provision of service using resale, relying in large part on its holding that CLECs themselves are required to assume the risk and make the investment necessary to combine unbundled network elements purchased from the ILEC. The Court reasoned as follows:

> We do not believe that this interpretation of subsection 251(c)(3) will cause all requesting carriers to select unbundled access over resale as their preferred route to enter the local telecommunications market. Although a competing carrier may obtain the capability of providing local telephone service at cost-based rates under unbundled access as opposed to wholesale rates under resale, unbundled access has several disadvantages that preserve resale as a meaningful alternative . . . . [O]ur decision requiring the requesting carriers to combine the elements themselves increases the costs and risks associated with unbundled access as a method of entering the local telecommunications industry and simultaneously makes resale a distinct and attractive option. With resale, a competing carrier can avoid expending valuable time and resources recombining unbundled network elements.
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> Given the disadvantages of completely relying on unbundled access as a means to provide local telecommunications services, we believe that many new entrant carriers will choose to resell such services under subsection 251(c)(4). Consequently, we do not believe that incumbent LECs will lose all of the customers to whom they charge higher prices in order to fulfill their current universal service obligations. The increased risk and the additional cost of recombining the unbundled element will hinder the ability of competing carriers to undercut these prices and lure these customers away from the incumbent LECs.

Id.

Following the Eighth Circuit ruling, this Commission issued Order No. U-22252-A dated September 5, 1997. In that Order, the LPSC approved BellSouth's SGAT, subject to deletion of the language concerning combination of network elements and inclusion of the following language: "A requesting carrier is entitled to gain access to all of the unbundled elements that, when combined by the requesting carrier, are sufficient to enable the requesting carrier to provide telecommunications service. Requesting carriers will combine the unbundled elements themselves." BellSouth's revised SGAT filed on September 9th includes this language, which is fully consistent with the Eighth Circuit opinion.

Notwithstanding the clear language of the Eighth Circuit opinion, both AT&T and MCI argue in Comments filed on September 15, 1997 in Docket No. 22252 that they are entitled to

purchase and receive from the ILECs "bundled" as opposed to "unbundled" network elements. They contend that the absolute duty imposed by the Court on CLECs to combine themselves the unbundled network elements purchased from the ILEC applies only to "new combinations of network elements that do not exist within today's network." *See* AT&T's Comments on the Eighth Circuit's Decision, at p. 2 (emphasis in original). Whatever the term "new combinations" of network elements is supposed to mean (and that is far from clear), the term appears nowhere in the portion of the Eighth Circuit opinion discussing this issue. The Court's holding that CLECs must combine unbundled network elements purchased from ILECs is not, as AT&T intimates, limited or conditioned in any way. AT&T and MCI's arguments are flatly inconsistent with the Eighth Circuit's language quoted above. Requiring an ILEC to provide its entire current local exchange network already assembled and combined into a fully functioning platform for providing finished telephone service is plainly not providing elements "on an unbundled basis." 47 U.S.C. 251(c)(3).

The sole basis for the AT&T and MCI argument is the fact that the Eighth Circuit did not vacate Section 51.315(b) of the FCC rules, in addition to vacating Section 51.315(c)-(d). Section 51.315(b) provides that "[e]xcept upon request, an incumbent LEC shall not separate requested network elements that the incumbent LEC currently combines." The Eighth Circuit does not discuss this rule anywhere in its July 29th opinion, and the AT&T and MCI's interpretation of Section 51.315(b) as requiring BellSouth to provide "unbundled" network elements as a pre-assembled platform for providing finished telephone service is flatly inconsistent with the language of the Eighth Circuit's decision.